

Attorney Docket No. P6252US

Remarks:

Claims 1-23 are currently pending in this application.

Claim Rejections - 35 U.S.C. §112

In the Final Office Action mailed August 21, 2007, claims 1-23 were rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. More specifically, the rejections stated that the specification as originally filed does not show support of the recognition to exclude with respect to the starch. As Applicants have previously stated, the subject nature of claim 1 and its claims to a composition in which the only starch utilized is a non-pregelatinized modified starch is not only explicitly described within the specification but in addition, the processing advantages over pregelatinized modified starches are explicitly discussed as well. Applicant again directs the attention of the Examiner to the specification as originally filed at page 9, line 18 - page 10, line 2, wherein it is stated that, "Pregelatinized starch tends to develop a higher viscosity too quickly for this application." and that, "Applicants have discovered that that a *non-pregelatinized*, modified starch that is resistant to such breakdown tends to provide suitable viscosity characteristics during processing." Applicants respectfully reiterate and assert that the specification indeed provides with clarity, the exclusionary or limiting nature of the modified starch.

Rather than consider the express language of the specification, the Examiner in developing support for this non-exclusionary argument, instead relies on a single sentence from the specification that is read completely out of context, and when properly read in the context in which it appears does not support the Examiner's rationale. In citing the statement found at page 9, lines 12-13, "In particular, non-pregelatinized, modified starch can be used in the present invention.", the Examiner ignores the broader discussion of starch preceding this sentence as well as the subsequent paragraphs in which specific properties are recited that exclude the consideration of pregelatinized starches as part of the presently claimed invention.

Furthermore, Applicant respectfully directs the attention of the Examiner to MPEP Section 2111.03 in which the scope of the transitional phrase "consisting essentially of" is discussed. "The transitional phrase "consisting essentially of" limits the scope of a claim to the specified materials of steps "and those that do not materially affect the basic and novel characteristic(s) of the claimed invention." MPEP 2111.03, citing *In re Herz*, 190 USPQ 461, 463 (CCPA 1976). As discussed in MPEP 2111.03, the transitional phrase "consisting essentially of" occupies a middle ground between closed claims and fully open claims and are generally construed as equivalent to comprising unless there is a clear indication in the specification of what the basic and novel characteristics are. As all starches are either pregelatinized or nonpregelatinized, Applicant respectfully asserts that the explicit discussion

Attorney Docket No. P6252US

of the unsuitability of pregelatinized starch in the specification clearly indicates that the pending claims cannot include pregelatinized starches, and consequently, the only alternative are non-pregelatinized starches.

For these reasons, Applicants again assert that clear and explicit support exists for the exclusionary nature of independent claims 1, 17 and 21 and withdrawal of said rejections is requested.

Claim Rejections – 35 U.S.C. §103(a)

In the Office Action mailed August 4, 2006, claims 1-23 were again rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 4,937,091 to Zallie et al. in view of the non-patent reference to Magnuson. Applicants respectfully traverse said rejection.

As discussed both in the preceding discussion and prior responses, pending independent claims 1, 17 and 21 all include limitations directed to Applicants' discovery that using an amount of a non-dairy protein with an amount of non-pregelatinized, modified (e.g., thermally inhibited or chemically modified) starch, advantageously provides a cheese-substitute product comparable to that of 'real' or natural cheese while using significantly less casein protein. Furthermore, the pending claims are directed to Applicants' discovery that pregelatinized starches can **not** be successfully used due to viscosity issues and problems that arise during processing. The pending claims are not directed to blends of starches but instead focus solely on the use of non-pregelatinized, modified starch as the starch component in the pending claims.

Zallie et al. fails to teach, suggest, or motivate one of ordinary skill in the art to utilize non-pregelatinized, modified starch as the sole starch component within a composition. In fact, Zallie et al. teaches away from the presently pending claims by disclosing that blends of starches include at least 20% enzymatically, debranched starch (col. 7, lines 62-64) wherein the debranched starch is described as being, "...pregelatinized to form a cheese having desirable textural properties." (Col. 43, Lines 16-17) Nowhere within Zallie et al. is there any recognition of the benefits of solely utilizing non-pregelatinized, modified starches as presently claimed.

Magnuson is cited solely for its disclosure of the use of wheat gluten in the preparation of cheese but fails to address or cure the previously identified deficiencies of Zallie et al.

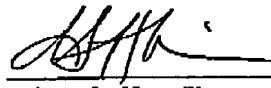
In the prior response, Applicant respectfully requested the Examiner indicate that official notice was being taken that the use of specific types of starch is no more than a matter of choice and well within the skill of the art. Applicant respectfully renews said request and requests that documentary evidence support said proposition be provided. Applicant respectfully asserts that the only objective evidence currently proffered by the Examiner, Zallie et al., tends to contradict the Examiner's assertion.

Attorney Docket No. P6252US

For at least these reasons, Applicants respectfully assert that Zallie et al. and Magnuson, considered either alone or in combination, fail to render the presently amended claims as *prima facie* obvious. As such, Applicants respectfully request reconsideration and allowance of the claims. Early notice of allowability is kindly requested. Please contact the undersigned if it will assist in expediting prosecution of these claims.

Please apply any charges or refunds to Deposit Account No. 16-0631 and provide notification of such transaction(s) to the address below.

Respectfully submitted,



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